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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of NICOLE E. and
MARK L. SCHNEIDER.

B208841

(Los Angeles County
Super. Ct. No. BD466217)

NICOLE E. SCHNEIDER,

Respondent,

v.

MARK L. SCHNEIDER,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Gretchen W. Taylor, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Kolodny & Anteau, Ronald W. Anteau and James L. Keane for Appellant.

Browne Woods George, Eric M. George and Ira Bibbero for Respondent.

Mark L. Schneider appeals from a post-judgment order in this dissolution proceeding awarding his former wife, Nicole E. Schneider, \$225,000 in need-based attorney fees and costs pursuant to Family Code section 2030, subdivision (a)(1),¹ and \$10,000 in fees and costs as sanctions under section 271. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nicole² and Mark entered into a stipulated judgment dissolving their three-year marriage in April 2003.³ The judgment provided, in part, that Mark would pay spousal support to Nicole of \$50,000 per year for five years, beginning April 18, 2004. Mark's failure to make those annual support payments in a timely fashion ultimately led to the fee award now before us.

1. The Initial Enforcement and Offset Proceedings

In August 2004 Nicole applied for an order to show cause to enforce the judgment. In response Mark filed his own request for an order to show cause in October 2004 claiming Nicole had misappropriated some of his separate property while retrieving her personal property from a Colorado storage locker. Mark acknowledged he owed the spousal support sought by Nicole and conceded his ability to pay the sums due, but claimed entitlement to an offset for the value of the allegedly misappropriated property as well as for a \$39,000 payment he had allegedly made to Nicole as an advance on support.⁴

¹ Statutory references are to the Family Code unless otherwise indicated.

² As is customary in family law matters, we refer to the parties by their first names for convenience and clarity. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1466, fn. 1.)

³ The dissolution proceedings were initiated, and the stipulated judgment entered, in the Superior Court for Riverside County. The case was transferred to Los Angeles in May 2007. The fee award challenged in this appeal was issued by the Los Angeles Superior Court.

⁴ Nicole has argued the \$39,000 payment was consideration for her agreement to move out of the parties' residence in Indian Wells earlier than they had planned.

The parties stipulated to the appointment of retired Judge Stephen A. Lachs as a temporary judge through December 31, 2005 to hear all post-judgment proceedings. Although there apparently was significant discovery-related activity while the matter was pending before Judge Lachs, there was no resolution of the enforcement or offset issues. Nicole was represented in most of these proceedings by Nachshin & Weston.

2. The Colorado Misappropriation Action

In March 2005, while the offset issue was still pending before Judge Lachs, Mark sued Bailey's Moving and Storage, the company that operated the storage facility, in Colorado state court, alleging it had wrongfully permitted Nicole to take his property. Bailey's impleaded Nicole, and Mark was subsequently given leave to sue Nicole directly in Colorado. Mark then settled the Colorado action with Bailey's. Although a Colorado jury ultimately found Nicole had improperly taken property worth \$40,000, Mark recovered nothing against Nicole, apparently because "the jury attributed 70% of contributory blame to [Mark]. Per Colorado law, an aggrieved party's capacity to recover is denied where the aggrieved party is attributed to more than half the blame."

3. The May 2006 Enforcement Proceedings and Mark's Appeal

On May 12, 2006, following expiration of Judge Lachs's assignment as temporary judge in the parties' post-judgment proceedings and at the request of Nicole, now represented by Trope and Trope, the Riverside Superior Court issued a writ of execution for all spousal support arrearages to date (the 2004, 2005 and 2006 annual payments) and awarded Nicole \$15,000 in attorney fees. Mark filed a notice of appeal in late June 2006. Nicole applied for an order requiring Mark to contribute to her attorney fees to defend the appeal. On November 27, 2006 the court ordered Mark to pay Nicole's counsel \$46,600 in estimated fees.

Nicole subsequently moved to dismiss Mark's appeal on various grounds, including his failure to pay attorney fees ordered to allow Nicole to proceed as respondent in the appeal. In June 2007 Division Two of the Fourth Appellate District, where the cause was pending, dismissed Mark's appeal on the ground he was "in

contempt of a final order to pay in advance respondent's attorney fees and costs" on appeal. While Mark's petition for review of the order dismissing his appeal was pending in the Supreme Court, he paid the \$46,600 in attorney fees previously ordered by the court. In September 2007, after the petition for review was denied, the writ of execution was paid from the bond posted by Mark to stay enforcement of the writ pending his appeal. By this time the April 2007 annual support installment was due and unpaid.

While the appellate proceedings were pending, Nicole applied for an order to show cause seeking, in part, orders confirming the property she had taken from the Colorado storage locker was, in fact, her own property and directing Mark to seek a stay of the Colorado action or its transfer to California. Nicole also sought \$275,000 in attorney fees. At Mark's request these matters were stayed.

4. The August 2007 Fee Request

On August 30, 2007, following transfer of the action from the Riverside Superior Court to Los Angeles Superior Court, Nicole filed a new motion for attorney fees, renewed her prior motion regarding the Colorado personal property (arguing the doctrine of res judicata precluded any further effort by Mark to recover on a theory of conversion or offset) and sought an order to show cause re contempt for Mark's failure to pay spousal support. In November 2007 the court decided Mark's damage claims based on the alleged conversion of his personal property were not precluded by the dismissal of his appeal and the finality of the Riverside court's May 12, 2006 order, but also ruled the issue of offset was foreclosed.

Nicole's motion for fees and costs, based on both sections 2030, need-based fees, and 271, fees-as-sanctions, sought an award of "actual but not less than \$516,981" in fees and \$5,000 in costs. That total included \$155,678.37 in fees incurred by Nachshin & Weston prior to issuance of the writ of execution on May 12, 2006 and \$164,036.25 incurred in defending against Mark's Colorado lawsuit. With the parties' agreement, the trial court subsequently severed consideration of any award of fees for the Colorado action.

The hearing on Nicole's motion for attorney fees, originally set for October 1, 2007, was continued several times for discovery and several rounds of additional briefing by both parties. During the pendency of the motion Nicole's counsel, Trope and Trope, filed a supplemental declaration attesting to \$31,793.60 in additional fees and costs incurred after the cutoff dates of the declaration submitted with the August 30, 2007 motion; and Browne Woods & George, which had effectively taken over Nicole's representation, filed a supplemental declaration seeking recovery of an additional \$85,576 in fees and costs (not including a supplemental request for fees involving Nicole's defense in the Colorado action). As part of his various responding and opposition papers, in February 2008 Mark filed his own request for \$376,000 in fees as sanctions against Nicole under section 271 for her purportedly abusive litigation tactics.

At the hearing on the requests on March 14, 2008 Nicole's counsel from Browne Woods & George represented she had incurred an additional \$48,662 in fees and costs exclusive of fees and costs involving the Colorado action. Nicole provided the trial court with a chart summarizing all fees being sought. The court sought clarification as to the fees actually paid by Nicole and the source of funds used to pay those fees.

In its ruling filed April 22, 2008 the court found Mark had the ability to contribute to Nicole's fees and costs and Nicole had a need for the contributions. The court further found certain actions by Mark were not reasonable, in particular his failure to pay spousal support on time and his decision to pursue the Colorado misappropriation action while the same issue was pending before the California courts. The court also found certain of Nicole's litigation positions were unreasonable, giving as an example Nicole's argument that *res judicata* precluded Mark from continuing to litigate his claim she had misappropriated property from the Colorado storage locker. In addition, the court concluded Nicole was not entitled to recover any of the \$155,678 in fees incurred by her first counsel, Nachshin & Weston, on the ground that firm's work produced no tangible result and was, in effect, duplicated by the efforts of subsequent counsel. The court awarded Nicole \$225,000 in need-based fees pursuant to section 2030 and \$10,000 in

sanctions pursuant to section 271.⁵ The court declined to issue any section 271 sanctions against Nicole.

Mark filed a timely notice of appeal.⁶

⁵ On page 10 of its Decision on the Issue of Attorney's Fees & Costs, the trial court found, "[t]he reasonable attorney's fees and costs of Petitioner crediting Respondent with Payments on account for the above described OSC's are in the sum of \$350,000." On page 19 (the final page) of the decision, following its statement, "The Court makes the following orders for fees and costs," the court awarded Nicole "the sum of \$225,000 pursuant to [section] 2030" and "\$10,000 pursuant to [section] 271." In response to a request for clarification from Mark, on April 28, 2008 the court corrected its decision, stating that "[t]he \$350,000 figure is not an order for payment of fees" and that "[t]he sole order for payment of fees is that order contained on page 19 of the Decision, for the aggregate sum of \$235,000."

⁶ After the filing of Mark's opening brief, Nicole moved to dismiss the appeal on the ground Mark had violated the trial court's order awarding her spousal support by failing to make the final two annual payments, due April 18, 2007 and April 18, 2008. (See, e.g., *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 [father who removed his children from California to Mexico in violation of a divorce decree was precluded from appealing from order awarding his former wife her attorney fees and costs incurred in trying to locate the children; "[a] party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state"]; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379 ["[i]t is well settled that this court has the inherent power to dismiss an appeal by any party who has refused to comply with the orders of the trial court"; formal judgment of contempt is not a prerequisite to exercising the power to dismiss].) The motion was referred to the full panel to consider with the hearing on the merits of Mark's appeal. Thereafter, in a supplemental declaration opposing the motion Mark's counsel provided documents indicating the two support installments had recently been paid and that Nicole's counsel had provided an acknowledgement of satisfaction of matured installments. Shortly before oral argument, Nicole filed a second motion to dismiss the appeal based on Mark's failure to appear at a judgment debtor examination. (Cf. *Tobin v. Casaus* (1954) 128 Cal.App.2d 588, 593 [appeal to be dismissed in 30 days unless appellant "responds unequivocally to the process of the court below" following failure to appear at judgment debtor examination or respond properly to bench warrant].) While we do not condone Mark's willful disobedience of valid court orders, if that has occurred, in light of our decision to affirm the attorney fee order on the merits, the motions to dismiss are denied as unnecessary.

DISCUSSION

1. *Governing Statutes and Standard of Review*

a. *Section 2030*

Section 2030 authorizes a need-based award of attorney fees and costs to “ensure that each party has access to legal representation to preserve each party’s rights” in a proceeding for dissolution of marriage and in any proceeding subsequent to entry of a judgment dissolution. (§ 2030, subd. (a)(1).) In determining whether to order one party to pay another party’s fees and costs and, if ordered, what amount shall be paid, the court is to consider the respective incomes and needs of the parties and all other circumstances affecting the parties’ respective abilities to pay for legal representation. (§ 2030, subd. (a)(2).) “The court may make an award of attorney’s fees and costs under Section 2030 . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.” (§ 2032, subd. (a); see *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 865 (*Keech*).)

Although the payee-spouse’s need and the payor-spouse’s ability to pay are the central factors to be considered, the trial court retains broad discretion in determining the amount of fees to award pursuant to section 2030, particularly with respect to the nature and complexity of the litigation. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 314; *Keech, supra*, 75 Cal.App.4th at pp. 865-866.) “‘The need of a spouse for an award of attorney’s fees and the amount of that award are matters addressed to the sound discretion of the trial court. [Citation.] The exercise of this discretion will not be disturbed on appeal “without a clear showing of abuse.”’” (*In re Marriage of Schaffer* (1984) 158 Cal.App.3d 930, 935-936.) “‘The discretion invoked is that of the trial court, not the reviewing court, and the trial court’s order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.’” (*Keech*, at p. 866.)

b. *Section 271*

Unlike section 2030, which is designed to effect parity between spouses in their ability to obtain effective legal representation, section 271 provides the trial court in family law proceedings with authority to order payment of attorney fees and costs in the nature of a sanction to encourage cooperation and discourage litigation tactics that increase the cost of litigation. (§ 271, subd. (a).)⁷ “Family law litigants who flout that policy [of promoting settlement of issues and cooperation among counsel and parties] by engaging in conduct that increases litigation costs are subject to the imposition of attorneys’ fees and costs as a sanction.” (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177; see *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225.) An award of fees as a sanction under section 271 does not require any showing of need or actual injury. (See *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478-1479.)

A sanctions order under section 271 is reviewed for abuse of discretion. (*In re Marriage of Feldman, supra*, 153 Cal.App.4th at p. 1478; *In re Marriage of Corona, supra*, 172 Cal.App.4th at p. 1225.) However, “[w]e review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review.” (*Feldman*, at p. 1479.)

⁷ Section 271, subdivision (a), provides, “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney’s fees and costs is not required to demonstrate any financial need for the award.”

2. The Trial Court Did Not Abuse Its Discretion in Awarding Need-based Fees to Nicole

Nicole's section 2030 fee request was supported by extensive explanatory declarations from the lawyers involved and related billing statements detailing the services provided for the fees incurred. Mark challenges the court's order awarding \$225,000 in fees on several related grounds.

First, based on simple arithmetic, he argues the award necessarily included fees incurred by Nachshin & Weston in connection with the unproductive proceedings before Judge Lachs although the trial court had ruled Nicole should not be permitted to recover anything further for the services of those lawyers on the ground it would be duplicative: Starting with Nicole's August 30, 2007 fee request of \$516,981, Mark subtracts \$164,036 in fees requested for the Colorado litigation because that issue was severed. Subtracting \$155,678 in Nachshin & Weston fees from the \$352,945 difference leaves only \$197,267 as Nicole's maximum possible recovery. Yet the court awarded her—impermissibly, in Mark's view—\$225,000.

Mark's argument rests on the flawed assumption the initial filing by Nicole on August 30, 2007 constituted her entire fee request. As discussed, supplemental, post-August 2007 fee requests were submitted on behalf of both Trope and Trope and Browne, Woods & George in the trial court—requests that increased the total fees and costs by more than \$165,000. Giving Mark credit for the \$61,600 he had previously paid and excluding the Colorado litigation and Nachshin & Weston fees, there remained more than \$300,000 in fees incurred by Nicole potentially subject to recovery from Mark under section 2030. The actual award of \$225,000 did not “necessarily” include any excluded or duplicative fees.

To be sure, as Mark notes, the trial court's decision does not make any specific reference to Nicole's supplemental fee requests. Yet there is no dispute the supplemental declarations with supporting exhibits were filed with the court. Under the doctrine of implied findings—presuming the court made all factual findings necessary to support the order for which there is substantial evidence—and indulging all intendments in favor of

the award, we conclude the trial court properly based its order on all the fee requests presented by Nicole. (See *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549-550, fn. 11; see generally *Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1595 [“[a]s all intendments are in favor of the judgment, we presume the trial court decided all material issues”].)⁸ Accordingly, the \$225,000 fee award did not improperly include reimbursement for Nachshin & Weston’s services.

Hewing to the same line of attack—and again incorporating the erroneous assumption that the supplemental fee requests are properly disregarded in determining whether the trial court abused its discretion in awarding Nicole’s fees—Mark argues Nicole’s August 30, 2007 request for fees included \$104,566 for Browne Woods & George’s services in responding to Mark’s unsuccessful appeal from the May 12, 2006 order. Yet, as the trial court recognized, Mark ultimately paid \$46,600 toward those fees pursuant to an earlier order, reducing this category to approximately \$58,000 and Nicole’s permissible, non-Nachshin & Weston fees to approximately \$150,000. Again according to Mark, the \$225,000 award must have included some portion of these excluded or duplicate fees.

Finally, with respect to what Mark views as the remaining \$150,000, \$91,863 represents fees incurred by Trope and Trope between November 2006 and June 2007. Mark argues none of those fees was “reasonably necessary” to the post-judgment litigation and contends a significant portion related to Nicole’s failed argument that the dismissal of an earlier OSC precluded him from asserting his damage claim based on Nicole’s alleged misappropriation of personal property in Colorado, a position the trial court found unreasonable.

⁸ In his briefs in this court Mark points to a number of minor mistakes in the trial court’s decision—most of which appear to be the result of the court’s use of a template for fee orders that was not adequately revised (or proofread) to fit the facts and legal arguments in this case. None of the errors (other than the mistaken reference to an award of \$350,000 fees in the body of the decision, which was promptly corrected at Mark’s request) is significant or undermines the validity of the order.

As discussed, after excluding the Nachshin & Weston and Colorado litigation fees and crediting Mark for the \$61,600 he had previously paid, the full fee request before the court at the March 2008 hearing exceeded \$300,000, not the \$150,000 Mark posits. The court awarded Nicole approximately 75% of her request, a decision that, together with the court's narrative explaining its order, reflects an appropriate evaluation of the relevant factors under section 2030, including the nature of the litigation, its complexity and the relative success achieved. Considering all the evidence viewed most favorably in support of the order, the award of \$225,000 to Nicole did not constitute an abuse of the trial court's discretion. (See *Keech, supra*, 75 Cal.App.4th at p. 866.)

3. *The Trial Court Did Not Abuse Its Discretion in Denying Mark's Request for Sanctions*

Mark and Nicole each asserted the other party's unreasonable conduct had contributed to the substantial fees and costs incurred in the post-judgment proceedings. Based primarily on his contention that Nicole had frustrated the possibility of an early settlement when the matters were still before Judge Lachs,⁹ Mark sought \$376,000 in fees as sanctions against Nicole under section 271. The trial court rejected Mark's request and instead awarded Nicole \$10,000 as sanctions because Mark's decision to pursue the Colorado action while an order to show cause was pending to determine whether Nicole had misappropriated his personal property "frustrated settlement and unreasonably added to [Nicole's] fees." The court also found Mark was responsible for the post-judgment enforcement proceedings because of his refusal to timely pay the support he conceded he

⁹ As discussed, Mark conceded he had the resources to pay all sums sought by Nicole. However, because Mark no longer lived in the United States, Nicole was concerned about her ability to enforce a judgment. To obviate the need for discovery regarding the identity and location of assets on which to levy, Judge Lachs had suggested Mark place the amount claimed by Nicole in his attorney's trust account. Mark ultimately offered to place \$250,000 in marketable securities into a trust account pending the hearing on the orders to show cause. Nicole rejected that offer, in part, because it was insufficient to ensure collection of an award of attorney fees, as well as past due spousal support and interest.

owed to Nicole. Mark argues the trial court abused its discretion in denying his request for sanctions. (No direct challenge is made to the sanctions award to Nicole.)

Viewing the evidence most favorably in support of the trial court's order, we have no doubt the decision to deny any fees as sanctions to Mark was neither arbitrary nor exceeded the bounds of reason. (See *In re Marriage of Corona, supra*, 172 Cal.App.4th at pp. 1225-1226 ["we will overturn such an order only if, considering all the evidence viewed most favorably in its support and indulging all reasonable inferences in its favor, no judge could reasonably make the order"]; see also *In re Woodham* (2001) 95 Cal.App.4th 438, 443 ["The 'imposition of sanctions, monetary or otherwise, is within the discretion of the trial court. That discretion must be exercised in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards as adapted to current circumstances.'"].) More fundamentally, a fee award pursuant to section 271 is entirely discretionary: The court "may base an award of attorney's fees and costs" on an opposing party's abusive or unreasonable litigation tactics, but need not do so if it does not believe such an award would be in accord with the purpose of section 271. (See *Woodham*, at p. 443.) The trial court's denial of Mark's sanction request did not constitute an abuse of discretion.

DISPOSITION

The order awarding Nicole \$225,000 in section 2030 attorney fees and \$10,000 in fees pursuant to section 271 is affirmed. Nicole is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.